IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1394

STATE OF ALABAMA,
PETITIONER

VERSUS

KENNETH CANTRELL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I

"MANDATORY APPEAL"?

The respondent argues at length about what he refers to as a "mandatory appeal". Counsel for the petitioner is at a loss to know what a "mandatory appeal" is. Apparently, "mandatory appeal" is the Respondent's term for an appeal as a matter of right under state law, but the respondent apparently sees such appeals as a necessary part of the procedure in every criminal case. At page 3 of the opposition brief "mandatory appeal" is referred to as being of ". . .

crucial importance to the complete adjudication of the criminal defendant's guilt. . . ." Of course, Alabama does not require convicts to appeal. Appeal is provided as of right, but no convict is required to appeal his conviction. In any event, such a mandatory appeal would present serious constitutional problems. A convict, such as the respondent, whose sentence is set by the Jury, faces the possibility of a heavier sentence if his conviction is set aside on appeal. *Chaffin v. Stynchcombe* 412 U.S. 17, 36 L. Ed 2d 714, 93 S. Ct. 1977 (1973) Where a guilty plea to a lesser included offense is set aside on appeal, the accused faces trial on the original charge. *Santobello v. New York* 404 U.S. 257 (Note 2 at 263), 30 L. Ed 2d 427, 433, 92 S. Ct. 495 (1971); *Clark v. State* 294 Ala 485, 318 So 2d 805 (1974); cert. den. 423 U.S. 937, 46 L. Ed 2d 270, 96 S. Ct. 298. Obviously, a state could not require a convicted person to appeal. The appeal at issue in this case is an appeal as of right under state law not a "mandatory appeal".

II

ON THE MERITS

The petition relies heavily on the decisions of this Honorable Court. In opposition, numerous cases from various circuits are cited. Of these, *Boyd v. Cowan* ([6th Cir., 1974] 494 F 2d 338) is the latest.[1] Boyd was decided three (3) months before this Honorable Court's decision in *Ross v. Moffitt* (417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 [1974]), which re-affirmed the rule that appeal is a creature

[1] The others include **Randazzo** v. **Follette** (2nd Cir. 1971) 444 F 2d 625, **Shiflett v. Virginia** (4th Cir. 1970) 433 F 2d 124; **Blanchard** v. **Brewer** (8th Cir. 1970) 429 F 2d 89, and **O'Brien** v. **Maroney** (3rd Cir. 1970) 423 F 2d 865.

of state law only. For this reason, if no other, these cases are utterly inapplicable. The petition does not question the extent to which the Fifth Circuit conformed its holding to the rules of other circuits but the extent to which it conformed its decision to the rules and policies of this Honorable Court. It is in the latter that the Honorable Court of Appeals utterly missed the mark.

The remainder of the opposition argument relates primarily to the non-existent mandatory appeal discussed above.

Douglas v. California (372 U.S. 353, 9 L. Ed 2d 811, 83 S. Ct. 814 [1963]) and *Anders v. California* (386 U.S. 738, 18 L. Ed 2d 493, 87 S. Ct. 1396 [1967]) hold only that the states may not discriminate against indigents. These cases do not require the states to give criminal appellants anything, save equal treatment. There is in this case no question of indigency nor discrimination.

This Honorable Court has specifically held that there is no Sixth Amendment right to counsel on appeal. *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed 2d 341, 94 S. Ct. 2437 (1974) The Sixth Amendment reads in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

An appeal is not a "criminal prosecution" but a proceeding to review the results of a criminal prosecution. Therefore, by its very terms the Sixth Amendment does not apply to appeals.

It is evident that in applying the Sixth Amendment to

the question of counsel on appeal and in ordering the writ of habeas corpus issued to set aside a uniform application of a state rule of appellate procedure the Honorable Court of Appeals ruled contrary to the prior decisions of this Honorable Court.

Finally the respondent sees no problem with requiring a State prosecutor to work both sides of a case handling the state's case and correcting the errors of defense counsel. (Opposition Brief pages 4-5) As pointed out in the petition, such a requirement is untenable both legally and practically.

III

THIS CASE PRESENTS MATTERS OF EXTREME IMPORTANCE

It is argued by the Respondent that even if the Fifth Circuit's decision is in error, this case presents no issue of "overriding" importance. This case is, however, of extreme importance for at least three different reasons, besides the fact that it results in the erroneous absolute release of a man who murdered a policeman in cold blood.

First: Dismissal of appeals is the most common way of enforcing rules of appellate procedure. At issue therefore, are potentially hundreds of Alabama convictions which may be invalidated because of various errors of retained lawyers.[2] In addition, the state and federal courts will be placed under a huge burden of additional litigation to determine in each of these cases if the error of the defense attorney reached Constitutional proportions and if the state learned of it at a time when it could have been corrected.

[2] It is very difficult to determine how many of these cases there are. Numerous dismissals are reported in the books, but most dismissals are by unreported memorandum order. The Fifth Circuit's rule in this case would probably also apply to failures of attorneys to preserve specific errors for review on appeal, and this situation probably exists in most cases.

Second: The failure of the Honorable Court of Appeals for the Fifth Circuit to come to terms with the precise constitutional nature of appeal rights and to distinguish, as this Court has, between the right to counsel at trial and on appeal has led to a chaos of contradictory holdings in the Fifth Circuit. In *Fitzgerald v. Estelle* ([5th Cir. 1975] 505 F 2d 1334), the Fifth Circuit attempted to resolve this chaos with an *en banc* decision. However, in deciding the instant case the Court cited *Fitzgerald* and pre-*Fitzgerald* and post-*Fitzgerald* cases without distinction. Obviously, the instant decision represents a return of the chaos of the pre-*Fitzgerald* period. This confusion will have to be resolved and, since the Fifth Circuit apparently cannot do it, it is respectfully submitted that this Honorable Court should do it.

Third: Most important of all, there is the matter of the Honorable Court of Appeals disregarding the policies and decisions of this court. In the Court of Appeals the State of Alabama presented arguments, substantially identical to those presented in the petition. These arguments relied heavily on the decisions of this Honorable Court. Yet, the Court of Appeals' decision makes no reference whatsoever to any holding of this court. Reading the Honorable Court of Appeals decision in this case by itself would lead one to believe that the Supreme Court of the United States has never addressed the questions of the right to appeal, in general, nor the right to counsel on appeal, in particular. Yet, this Honorable Court has issued numerous decisions on these subjects, and these decisions reflect a consistent policy. This policy is based on the very words of the Constitution

and a century of precedent. The chaos which now prevails in the Fifth and other circuits in this area of the law demonstrates the prudence of this court's policy. In deciding the instant case the Honorable United States Court of Appeals for the Fifth Circuit totally disregarded this policy and the controlling decisions of this Honorable Court. If this is not a matter of overriding importance, the petitioner is hard put to say what is.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama again respectfully submits that the decision and opinion of the Honorable United States Court of Appeals for the Fifth Circuit conflicts with the prior decisions of this Honorable Court and that this case presents an important question which has not been but ought to be addressed by this Honorable Court. For these reasons the State of Alabama again prays this Honorable Court to issue a writ of certiorari to review the opinion, decision and judgment of the Honorable United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this ____ day of May, 1977, I did serve the requisite number of copies of the foregoing Reply Brief on the attorney for the Respondent by mailing said copies to him, First Class postage prepaid, and addressed as follows:

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